Supreme Court, U.S.
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No. 91-1280

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

WALTER ZANT, WARDEN,

Petitioner,

v.

JIMMY LEE HORTON,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

This is an appeal from a case involving respondent Jimmy Lee Horton, a black defendant sentenced to death by an all-white jury in Macon, Georgia. The prosecutor, the same prosecutor whose directive to jury commissioners to underrepresent blacks in jury pools resulted in this Court's decision in Amadeo v. Zant, 486 U.S. 214 (1988), used nine of his jury strikes against blacks. The only aggravating circumstance found was that the offense of murder was committed while the offender was engaged in the commission of a burglary.

Horton's accomplice, Pless Brown, was tried separately before a jury of seven white persons and five black persons. Like Mr. Horton, Brown was convicted of all three offenses, but the racially mixed jury in his case rejected the death penalty and imposed a sentence of life imprisonment.

In January 1988, after exhausting his state remedies through a direct appeal and an application for state habeas corpus relief, Mr. Horton filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia. At an evidentiary hearing, Mr. Horton submitted extensive direct testimony and statistical evidence concerning the prosecutor's practice of using peremptory challenges in a racially discriminatory manner. The District Court rejected this and other claims raised by Mr. Horton and denied his petition.

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed Mr. Horton's convictions and sentence of death, finding three independent constitutional errors, any one of which

would have been sufficient to require relief. Horton v. Zant, 941 F.2d 1449, 1451 (11th Cir. 1991). (App. 56).

First, the court found a prima facie case of intentional discrimination under Swain v. Alabama, 380 U.S. 202 (1965),[1/] was made out by the statistical evidence demonstrating the prosecutor's disproportionate use of jury strikes against blacks and direct evidence of the prosecutor's bias, and that the State failed to rebut the claim of discrimination. (App. 77-79).

Second, the court held that Mr. Horton's Sixth Amendment right to effective assistance of counsel was violated during the penalty phase of his trial. Applying this Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), the court criticized three areas of trial counsel's representation: counsel's inexcusable failure to investigate or present any mitigating evidence at the penalty phase when ample mitigating evidence was readily available; counsel's incomprehensible attack on Mr. Horton's own character during closing argument; and counsel's deliberate distancing of himself from Mr. Horton, his ostensible client, during closing argument. The court concluded that these failures prejudiced Mr. Horton by presenting a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

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1/ The portion of Swain at issue here was overruled by Batson v. Kentucky, 476 U.S. 79 (1986); Swain governs only those few remaining cases in which the defendant's conviction became final before Batson was decided on April 30, 1986. Allen v. Hardy, 478 U.S. 255, 257-58 (1986). Because Horton's conviction became final in 1983, his case is one of the dwindling number of cases still governed by Swain.

have been different." (App. 87, quoting Strickland, 466 U.S. at 694).

Third, the court held that Mr. Horton's Sixth Amendment right of confrontation was violated by the admission of hearsay testimony that a few days after the shooting Horton's accomplice, Pless Brown, told a witness in a barroom conversation that Mr. Horton was the triggerman. Brown did not testify at Mr. Horton's trial, and Mr. Horton was therefore unable to cross-examine him about the statement. The Eleventh Circuit concluded that the statement did not fall within any well-established exception to the common law hearsay prohibition and did not have adequate independent indicia of reliability. (App. 91-92). Because the State made prominent use of this hearsay testimony at trial, the error was not harmless. (App. 92).

The State is now requesting a writ of certiorari to review the judgment of the Court of Appeals.

REASONS FOR DENYING CERTIORARI

This case is wholly unsuitable for review by certiorari. The State asks this Court to grant review principally to consider the proper contours of the doctrine of Swain v. Alabama, which this Court overruled more than five years ago. It candidly characterizes its position as "anomal[ous]." Petition at 11. Even this characterization understates the matter, however. We know of no case in this Court's entire history in which it granted discretionary review for the express purpose of considering the

contours of a then-overruled constitutional doctrine. It perhaps belabors the obvious to point out that the number of Swain claims still subject to post-conviction review is sharply dwindling, and the legal issue presented is therefore of little practical significance beyond this case.

Moreover, Mr. Horton's Swain claim was only one of three claims, each of which "constitute[d] an independent basis for granting the writ" (App. 56), and the Eleventh Circuit's ruling on each of the three was a straightforward application of this Court's precedents to the particular facts of this case. The Eleventh Circuit's rulings broke no new ground.

To begin with, the facts regarding the prosecutor's intent to discriminate were either undisputed or stipulated to by the parties. There was direct evidence of racial discrimination by the prosecutor, Joe Briley, whose reprehensible conduct this Court criticized four years ago in Amadeo v. Zant, 486 U.S. 214 (1988). Mr. Briley's "scheme . . . to underrepresent black people . . . on the master jury lists from which all grand and traverse (petit) juries were drawn," Amadeo v. Zant, 486 U.S. 214, 217 (1988), was amply demonstrated by the "now infamous memo" (App. 67) which he authored. The facts that gave rise to that finding are undisputed. Moreover, the State stipulated to the accuracy of the jury strike evidence offered by Mr. Horton, (App. 74), on which the court of appeals relied in finding racially discriminatory intent in Mr. Briley's exercise of peremptory challenges.

Second, in finding a confrontation clause violation, the Eleventh Circuit merely applied the settled constitutional principles of Ohio v. Roberts, 448 U.S. 171 (1987), to an unusual set of facts. The hearsay testimony at issue was admitted under Georgia's "unique" co-conspirator exception to hearsay rule, which is "much broader than the traditional common law exception." (App. 90-91). Accordingly, the court of appeals proceeded to apply settled precedents in determining whether the statements bore sufficient indicia of reliability. As this Court explained in Roberts:

> Reflecting its underlying purpose to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."

Id. at 65, quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934).

The out-of-court statement of Pless Brown, Mr. Horton's accomplice, purported to exculpate Brown. Brown also made it during a period of intense media coverage of the crime, and he supposedly made it to a friend while drinking in a bar, seeking to shift the blame from himself to Mr. Horton. In these circumstances, the court of appeals properly concluded that Brown's words lacked reliability.

Finally, the finding of ineffective assistance of counsel at the penalty phase was, as we discuss below, unremarkable and compelled by the undisputed evidence. In criticizing the lower

court's decision, petitioner has misrepresented its holdings and has ignored the facts on which those holdings were based.

1. The Eleventh Circuit Did Not Ignore The "Clearly Erroneous" Rule In Deciding the Swain Issue

The State claims that the court of appeals "accorded no deference to any of the facts found by the District Court on the Swain issue," Petition at 14, and instead made its own contrary factual findings. The Eleventh Circuit did no such thing. Most of the facts relating to the "smoking gun" memo written by Mr. Briley to underrepresent blacks in the Putnam County jury pool are undisputed. Mr. Briley acknowledged writing the memo; his only excuse was that the state trial judge, who is now deceased, ordered him to tamper with the number of black jurors to be selected. Neither the district court nor the court of appeals made any factual finding on this issue. (App. 70). Instead, the court of appeals held that, even if Mr. Briley's version of the story were true, "we cannot condone his behavior" since "the mere fact that a judge orders a prosecutor to engage in unconstitutional discrimination on the basis of race and sex does not make the behavior right." (App. 70).

The State also erroneously claims that the court of appeals made factual findings with regard to the jury strike statistics that were introduced. The court had no occasion to make any factual findings since the statistics themselves were undisputed. The State's real complaint is that it disagrees with the Eleventh

Circuit's legal conclusion that the statistical evidence, together with the direct evidence of the prosecutor's discrimination, established a Swain violation. A careful review of the court's decision shows that it was entirely faithful to this Court's Swain analysis.

In short, we respectfully submit that the Swain issue would be inappropriate for review, even if it were the only issue on which the court of appeals had granted relief. First, the issue concerns a doctrine that this Court overruled six years ago. Second, the court of appeals applied this overruled doctrine to an extraordinary set of facts, not likely to be replicated in any of the few, and shrinking, number of cases to which Swain still applies. Third, the Eleventh Circuit's ruling was manifestly correct, for the undisputed facts show a particular prosecutor's pattern of discrimination spanning many years and taking multiple forms. The result was that an all-white jury convicted Mr. Horton and sentenced him to die.

2. Based on the Factors Set Forth in Dutton v. Evans or Virtually Any Other Standard, the Hearsay Statement at Issue Was Not Sufficiently Reliable to Warrant Its Admission

As the State acknowledges, the court of appeals correctly held that Georgia's rule permitting the admission of declarations made by a co-conspirator made during the concealment phase to be admitted is not a "firmly rooted" exception to the hearsay rule and that the State had to show independent indicia of reliability to justify the admission of such hearsay at trial. Petition, at 24-

25. The State likewise does not dispute that the court of appeals considered the factors suggested in Dutton v. Evans, 400 U.S. 74 (1970), for assessing reliability. The State takes issue only with the conclusion the court of appeals reached as to the unreliability of the hearsay statements, based on the particular circumstances under which they were made. Such a fact-specific issue hardly merits review by this Court.

Moreover, the State is simply wrong in arguing the reliability of Pless Brown's statement blaming the shooting on Mr. Horton. As Justice Scalia has noted, in reviewing the Court's confrontation clause cases in the last two decades: "Over the years since Douglas [v. Alabama, 380 U.S. 415 (1965)] the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." Lee v. Illinois, 476 U.S. 530, 541 (1986); see also Bruton v. United States, 391 U.S. 123 (1986); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965).

In Douglas and Lee, this Court found that statements to police which attempted to cast blame on an accomplice were too unreliable to be constitutionally admitted. Pless Brown's barroom statement to Hamp Davis was even less reliable. Brown had the same motivation to shift blame to his accomplice. Brown even had cause to believe that his statement to Davis would be relayed to the police, for Davis owned the pickup truck which Brown and Horton used on the night of the shooting. Brown could anticipate that the police eventually would interrogate Davis. At the same time, Brown

was not directly accountable to the police for anything that he said in the bar. Whatever reliability might have resulted from such accountability in Douglas and Lee was missing here.

As the Eleventh Circuit noted, the case against Mr. Horton was largely circumstantial. The ballistics evidence was inconclusive. (App. 58 & n.4). Residents of the apartment complex where the shooting took place heard shots fired, but no one witnessed the shooting. Id. The evidence as to which of the two burglars shot the decedent was so weak that Mr. Briley, the prosecutor in both Horton's and Brown's trials, told the jury in his closing argument during Brown's trial that "I am not going to tell you that I know who shot the gun that put the fatal bullet into Mr. Thompson. I'm not going to tell you I know because I don't." App. 59 & n.8. At trial, Mr. Horton denied that he shot Thompson and further denied ever telling Hamp Davis that he did so.

The Eleventh Circuit was also correct in concluding that the admission of Davis' hearsay testimony was not harmless. This testimony contained an "express assertion of past fact" on the critical contested issue -- whether Horton had fired the fatal shot. The prosecutor advised the jury in opening statement that Pless Brown had made statements incriminating Horton (T. Tr. 539-40) and in closing argument repeated Davis' hearsay testimony about what Brown purportedly told him. (T. Tr. 960-61). Had the jury credited Horton's defense that he did not shoot at Thompson, they might not have found him guilty of murder and, at a minimum, might have been less inclined to impose the death penalty. The Eleventh

Circuit correctly concluded that that defense was sharply undermined by the unreliable hearsay statements which Hamp Davis related.

3. The Court of Appeals Did Not Create a Per Se Duty for Counsel to Present Mitigating Evidence

Finally, the State claims that "[i]n direct contravention of this Court's decision in Burger v. Kemp, 483 U.S. 776 (1987), the circuit court created a per se duty under the Sixth Amendment requiring counsel to present all arguably mitigating evidence at the sentencing phase of a capital trial." Petition, at 27. The State mischaracterizes in several respects the circuit court's decision finding ineffective assistance of counsel at the sentencing phase.

First, this Court's decision in Burger holds only that the failure to introduce mitigating evidence is not ineffective where counsel made a strategic judgment, after a reasonable investigation, that the introduction of such evidence might be counterproductive. In order to be deemed a "strategic choice," the failure to call such witnesses must result from a "substantial investigation." Strickland v. Washington, 466 U.S. 668, 681 (1984). The Eleventh Circuit carefully analyzed trial counsel's conduct. Finding that his attorneys never even investigated or evaluated possible mitigating evidence, it concluded that the decision not to introduce such evidence could not be considered a reasonable strategic choice. (App. 83-84 & n.31). Horton breaks

no new ground and is consistent with many other cases that have applied Strickland to similar facts.[2/]

Moreover, the State utterly ignores the other two bases for the court of appeals' finding of ineffectiveness: that trial counsel "attacked his client's character and separated himself from his client." (App. 86). The statements of trial counsel at the penalty phase positively encouraged the jury to impose the death penalty, and the State at no point in this litigation has ever attempted to justify such inexcusable conduct.

The court of appeals' review of the relevant passages of trial counsel's closing argument in the penalty phase bears repeating:

> . . . Mr. Wallace [Mr. Horton's trial attorney] told the jury that "the only person you judge is not a very good person . . . I ask you for the life of a worthless man." And, the prosecutor's closing "made me hate my client. But then, I . . . try to be reasonable about the whole situation; and I don't hate him as much . . . Mr. Briley has admirably told you just exactly why it is that Jimmy Lee has got to die. And it becomes my turn to try and explain to you why you don't have to say he's got to die . . . I find my task virtually impossible . . . Maybe Mr.

2/ Harris v. Dugger, 874 F.2d 756, 762-64 (11th Cir.), cert. denied, ___ U.S. ___, 110 S. Ct. 573 (1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642, 652-55 (11th Cir.), cert. denied, 488 U.S. 872 (1988); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir.), cert. denied, 479 U.S. 996 (1986); Tyler v. Kemp, 755 F.2d 471 (11th Cir.), cert. denied, 474 U.S. 1026 (1985); Blake v. Kemp, 758 F.2d 583 (11th Cir.), cert. denied, 474 U.S. 998 (1985); Mathis v. Zant, 704 F. Supp. 1062 (N.D. Ga. 1989), appeal dismissed, 903 F.2d 1368 (11th Cir. 1990); Troedel v. Wainwright, 667 F. Supp. 1456 (S.D. Fla. 1986), aff'd sub nom. Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987).

> Briley is right, maybe he is not. Maybe he ought to die, but I don't know."
>
> . . . Mr. Wallace explained that he and his co-counsel were appointed counsel; that they were local lawyers and not "bleeding heart, anti-death penalty lawyers"; that the reason they were representing Horton was because it was their "civic duty"; and they stated that they "have to deal with [prosecutors] every day. It's important for me to stay in good with them. [I feel] there is a lot of peer pressure on me [but] nobody has tried to pressure me."

(App. 84-85) (emphasis added).

The court's determination of prejudice was likewise unremarkable and equally compelled by the evidence. Substantial evidence in mitigation could have been gathered and presented by Horton's counsel at the penalty phase of trial. Such evidence included the affidavits of ten individuals who were prepared to testify that Horton was a hard worker, had a trouble-free youth, was able to care for his wife and family, and was able to adjust to prison life. (App. 86-87). Moreover, counsel's deficient closing argument at the penalty phase actually may have encouraged the jury to recommend the death penalty. Id. The Eleventh Circuit correctly concluded that "[g]iven [counsel's] failure to present mitigating evidence and his unfortunate comments, clearly there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (App. 87), quoting Strickland, 466 U.S. at 694. Since the court of appeals faithfully applied this Court's ineffectiveness precedents, there is no reason for this Court to review that decision.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted,

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